Supreme Court, U.S.
FILED
00-491 SEP 25 2000
OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

STEVENS CREEK QUARRY, INCORPORATED,

Petitioner,

versus

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

WAS IT ERROR TO CONVERT THE PLAINTIFF'S SUBSTANTIVE DUE PROCESS CLAIM, WHICH ALLEGED THE VIOLATION OF A NON-PROPERTY-BASED FUNDAMENTAL RIGHT, INTO A TAKINGS CLAIM?

RULE 29.6

Stevens Creek Quarry, Inc., is a privately-held corporation, having no parent corporations. No publicly-held company owns any shares of Stevens Creek Quarry, Inc., stock.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Appendix, *infra*, pp. 1a-3a) was not reported. The opinion of the District Court for the Northern District of California (Appendix, *infra*, pp. 4a-15a) was not reported.

JURISDICTION

The Judgment of the Ninth Circuit Court of Appeals (Appendix p. 1a), as modified on denial of the Petitioner's Petition for Rehearing and Rehearing en banc, was entered on June 29, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The Due Process Clause of the Fourteenth Amendment of the United States Constitution, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

2. The Takings Clause of the Fifth Amendment of the United States Constitution, which provides:

> [N]or shall private property be taken for public use, without just compensation.

3. The Civil Rights Act, 42 U.S.C. § 1983, which provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of

> any State . . . subjects, or causes to be subjected, any citizen of the United States . . . within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Petitioner, Stevens Creek Quarry ("Quarry"), owns a construction materials mining operation located in Santa Clara County, California, which provides rock-based construction material for roads and buildings throughout the area where it is located. (E.R., p. 4, ¶ 21.) From a land use perspective, the Quarry operates pursuant to two entitlements: a nonconforming grandfathered use applicable to one portion of its property and a use permit first issued in 1950 and renewed in 1984, 1985, 1990, and 1995, which is applicable to the balance of the property. (E.R., pp. 4-5, ¶¶ 24-26.) However, and despite the existence of these vested entitlements, the Respondent, the County of Santa Clara ("County"), decided it wanted to substantially alter the way in which the Quarry would be allowed to conduct its business operations, even though it lacked the requisite legal authority to do so because of the nature of the entitlements involved. (E.R., pp. 5-11, ¶¶ 29-49.) When the Quarry objected to this course of action, the County decided to use its full force to attempt to compel the Quarry to renounce its vested entitlements, threatening to and then actually subjecting the Quarry to an unwarranted and unjustified series of occurrences, the intent of which was to compel the Quarry to renounce its vested property rights. (E.R., pp. 5-11, ¶¶ 29-49.) Essentially, these actions can best be characterized as

unwarranted governmental coercion amounting to nothing less than extortion.

In September 1996, the Quarry filed a civil rights claim under 42 U.S.C. § 1983 alleging that the County's actions violated the Quarry's substantive due process rights.[1] On December 14, 1998, the District Court Judge for the Northern District of California dismissed this claim under Fed. R. Civ. P. 12(b)(6) with prejudice.[2] The Ninth Circuit Court of Appeals affirmed the dismissal on June 29, 2000. The basis for the Ninth Circuit's decision was that Quarry's substantive due process claim was subsumed by the Fifth Amendment's Takings Clause.[3] *See* Appendix, *infra*, p. 12a-13a. Although the Ninth Circuit cited no case authority for its decision, it could only have relied on this Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989), and *Albright v. Oliver*, 510 U.S. 266 (1994). In those cases, this Court held that when an explicit constitutional provision provides protection from certain government behavior, that provision, not substantive due process, must be the basis for the plaintiff's relief. *Graham*, 490 U.S. at 395; *Albright*, 510 U.S. at 271. Those cases, however, should be viewed as inapplicable to a situation such as the one presented in this case, where there is no explicit constitutional provision pertaining to the conduct which is asserted to be constitutionally impermissible. Moreover, they should not be

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[1] The Quarry also alleged that the County's action deprived the Quarry of its right to procedural due process. The Quarry does not challenge the dismissal of its procedural due process claim in this Petition.

[2] The District Court had previously dismissed the Quarry's claims on February 10, 1997, allowing the Quarry leave to amend.

[3] The District Court denied the Quarry's substantive due process claim on a different ground—that the County's action was supported by a rational basis. *See* Appendix, infra, p. 12a-13a. As explained below, such an approach ignores the actual nature of the Quarry's substantive due process claim, which is that the County's action impinged on the Quarry's fundamental right to be free from governmental extortion. The District Court's application of the rational basis standard of review, therefore, was inappropriate.

viewed as providing a justification for converting a plaintiff's claim into something other than what was asserted.

REASONS FOR GRANTING THE WRIT

This case involves a claim that the Quarry's substantive due process rights were violated by an outrageous course of conduct pursued by the County. (E.R. 31, p. 10, ¶ 48.) More specifically, the Quarry asserts that the County sought to use its official position as a land use authority to force the Quarry to renounce its vested property rights. (E.R. 31, pp. 8-10, ¶¶ 40, 43, 46.) This was done by the County threatening that it would modify or revoke the Quarry's land use entitlements, even though it lacked the requisite authority to do so, unless the Quarry capitulated to its various demands. (E.R. 31, p. 8, ¶ 40.) As such, the County was essentially extorting the Quarry and, in the process, grossly misusing its police power authority.

Since protection from the type of outrageous conduct involved here is not specifically provided for in the Bill of Rights, the Quarry claimed that it was protected from such abusive behavior by substantive due process. The Ninth Circuit, while acknowledging the Quarry's claim of outrageous conduct by the County, nonetheless concluded that the Quarry had failed to state a claim for which relief might be granted, basing its decision upon the notion that the Quarry should have asserted a takings claim as opposed to a substantive due process claim. As the court indicated:

> The Quarry also contends that the County violated "its substantive due process rights" when it modified the use permit. This claim is characterized by a charge of outrageous conduct that is akin to a takings claim. Here, the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible.

> Thus, even construing the allegations of the complaint in the light most favorable to the Quarry, the Quarry still fails to state a claim for a violation of substantive due process.

Appendix, *infra.*, p. 3a.

A careful reading of this language reveals the actual position taken by the Court: namely, that, in the land use context, there can never be a substantive due process claim since all such claims are subsumed by the taking clause. Indeed, as the quoted language reveals, the Ninth Circuit has essentially concluded that outrageous conduct is a takings claim. The difficulty with this position, however, is that it completely obliterates the right to bring an action seeking recourse for the outrageous conduct itself. As such, it eliminates the very notion that a United States citizen is even protected, at least in the land use arena, from such outrageous official governmental conduct.

An analogy, which removes the doctrine espoused by the Ninth Circuit from the land use context, is perhaps helpful and can serve to illustrate the adverse consequences of following that position. For instance, imagine a situation where a person driving a car is stopped because of his race and, as a result of that stop, his car is without justification impounded. He then brings a claim for the violation of his civil rights based upon the contention that the conduct involved in actually stopping him violated his federally protected constitutional rights. If the Ninth Circuit position applied in this case were then to be followed here, he would be told that he cannot bring such a claim and that his sole recourse would be to seek compensation for the rental value of his car during the time it was illegitimately impounded. The ridiculousness of such a position is readily apparent because it denies the victim the opportunity to seek recourse for the outrageous conduct involved in stopping him in the first place. No less ridiculous is the position taken by the

Ninth Circuit in declaring that the outrageous conduct alleged in this case is not actionable and that the sole recourse available is to seek property based damages premised upon a takings claim.

The position of the Ninth Circuit has been developed over the past few years, with the disposition of this case being an unwarranted extension of earlier doctrine. In earlier cases, the Ninth Circuit had rightfully held that disguised takings claims could not be put forth as substantive due process claims simply to avoid the requirement of exhausting state judicial remedies before filing a takings claim in federal court. *See Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir. 1996) (en banc); *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997); *Buckles v. King County*, 191 F.3d 1127, 1138 (9th Cir. 1999). In those cases, the substantive due process claims involved were essentially takings claims and were rightfully disposed of as such. This case, however, involves much more than did those cases since here the actual claim put forth by the Quarry—that of outrageous conduct amounting to extortion—stands separate and apart from any takings claim. The Ninth Circuit's failure to recognize that point and allow the Quarry's substantive due process claim to proceed has resulted in the Quarry being denied a viable recourse for the violation of a federally protected constitutional right. It also is inconsistent with the recognition by this Court that rights other than property rights can be implicated, and violated, in the land use context.[4]

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[4] Moreover, the Ninth Circuit's position that the Takings Clause preempts *all* substantive due process claims contradicts the position of other circuits that have considered the issue. These Circuits have concluded that the doctrine of substantive due process continues to exist in cases involving land use disputes and is subsumed only when the claim asserted is actually a disguised takings claim. *See Tri County Indus. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997); *Bickerstaff Clay Prods. Co. v. Harris County*, 89 F.3d 1481, 1490 n.16 (11th Cir. 1996). Thus, in *Johns Corporation v. City of Houston*, the Fifth Circuit held that, before a court may conclude that the Takings Clause has

This Court's most recent recognition that non-property constitutional rights can be violated in the land use context occurred in *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000). There this Court, in a case involving an equal protection claim, held that the plaintiff had pled an actual violation of her constitutional rights where she had asserted that the defendant locality had singled her out for special treatment by requiring that she dedicate a larger easement than other similarly situated individuals as a precondition for being connected to the local water delivery system. *Id.* at 1075. Apparently, her contention was that she was the victim of vindictive action stemming from an earlier suit she and her late husband had filed against the locality. In any event, the *Olech* decision is indicative of this Court's recognition that there are constitutional rights, other than property rights, which can be violated in the land use context. Had that not been the case, this Court presumably would have indicated that Mrs. Olech's only recourse was to file a takings claim, not an equal protection claim. This Court, however, appears to have recognized that such a determination would have left the plaintiff without a recourse for the vindictive governmental conduct which had allegedly occurred.

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preempted a substantive due process claim, "a careful analysis must be undertaken to assess the extent to which a plaintiff's substantive due process claim rests on protections also afforded by the Takings Clause . . . ." 214 F.3d 573, 583 (5th Cir. 2000).

The Ninth Circuit's position is also at odds with this Court's recent decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). There, this Court allowed the plaintiff's estate to proceed under a claim of substantive due process because this Court had found that the government conduct at issue—high speed police pursuit—was neither a "search" nor "seizure" under the Fourth Amendment. *Id.* at 843-44. In *Lewis*, this Court affirmed that substantive due process continues to protect plaintiffs from wrongful government conduct that the Constitution does not explicitly proscribe. *See also United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997).

The distinction between the equal protection claim advanced in *Olech* and the substantive due process claim advanced in this case is one without any particular significance since both assertions involved the alleged denial of a fundamental constitutional right. Indeed, the entire claim advanced by the Quarry in this case is based upon the notion that an American citizen has a constitutionally-based right, albeit not specifically enumerated in the Bill of Rights, to be free of inappropriate governmental coercion and extortion. In rejecting this contention, the Ninth Circuit has essentially determined that the doctrine of substantive due process is limited and indeed that, in the land use context, it affords no per se protection whatsoever from outrageous governmental conduct unless a taking has occurred. Presumably, this notion is based upon the belief that all that can ever be implicated in a land use decision is the effects of economic regulation—an area where it has long been established that the doctrine of substantive due process may not be invoked to second guess the legitimate regulatory decisions of local land use authorities. However, that type of situation ought not to be confused with the one presented in this case where the doctrine of substantive due process is being invoked as a source of protection, not from economic regulation, but rather from outrageous governmental conduct. Clearly, to the extent such confusion is allowed to prevail, fundamental rights of American citizens will be left unprotected simply because of the subject matter context in which violations may occur.

As *Olech* illustrates, this Court recognizes that fundamental, non-property based rights are protected in the land use context just as they are in any other context where governmental action is involved. First Amendment cases from this Court, which likewise occurred against a backdrop of land use regulation, also illustrate this point. *See generally Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975). Similarly, this Court's decision in *Moore v. City of East*

Cleveland recognized the existence of a substantive due process right of a grandmother to live with her grandson, even though the violation of her rights occurred as part of a land use dispute. 431 U.S. 494, 502-03 (1977). Yet, despite these decisions, the Ninth Circuit in this case has indicated that there can never be a valid substantive due process claim in the land use context and that all such claims are actually takings claims and should be pled as such.

The Quarry submits that the position taken by the Ninth Circuit stems from a failure to recognize that the substantive due process doctrine, as applied in the land use context, has two separate and distinguishable components: namely, one component involving the fact that land use regulations involve economic interests and another revolving around the notion that there are certain non-economic fundamental rights which are not specifically enumerated in the Bill of Rights. The first of these components, which is all the Ninth Circuit recognizes, falls within the area where deference has traditionally been afforded to local land use decisions and where it has rightfully been determined that the appropriate recourse for inappropriate regulatory activity is a takings claim. The second, however, involves something quite different—non-economic fundamental rights—and that fact needs to be clarified by this Court so as to avoid ever increasing confusion in the federal judicial system as to the nature and appropriate recourse for the two very distinct types of substantive due process claims which have emerged in the land use jurisprudence.[5] Critical to any such

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[5] As one commentator has observed:

> Failure to separate the two types of substantive due process claims may result in some due process claims being preempted that ought not be. If the state prohibits redheaded persons from living in certain zones, the action may be arbitrary, but it does not constitute a taking. Likewise, if a state prohibits persons who are related by blood, marriage, or adoption from living in

clarification should be the development of standards for determining what constitutes each type of claim and how one can distinguish between an actual takings situation and one involving the assertion of a non-economic based fundamental right.

The need for clarification, even in the context of the unpublished disposition of this case, becomes even more pronounced in light of the vast number, indeed thousands, of land-use decisions rendered on an annual basis throughout the United States. Adding to this fact is that the regulatory activity involved here—wherein the regulating body can easily because of community pressures become somewhat less than neutral—presents a classic case for potential governmental abuse, not only to property rights but also to non-economic fundamental rights. Given this reality, American citizens, even if they are property owners and/or business operators, deserve to have clarified that they have a means of recourse available for redress of alleged violations of their non-economic based fundamental rights, as protected by substantive due process, even if the alleged violations happen to occur in the context of a land use dispute. If this is not done, innumerable fundamental rights will be ignored for no reason other than that they are involved in a controversy involving a land use issue.

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shared quarters, the action may violate substantive due process. The complainants deserve injunctive relief, and possibly damages, but they should not be relegated to a taking claim, where the only relief is compensation.

Thomas E. Roberts, *Takings, Due Process, and Preemption*, 29 Urb. Law. 399, 408 (1997).

CONCLUSION

For the reasons discussed above, the Quarry respectfully requests that this Court grant this petition for certiorari.

Respectfully submitted,

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(Any footnotes trail end of each document)
No. 99-15066

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVENS CREEK QUARRY, INCORPORATED,
Plaintiff-Appellant,

v.

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,
Defendants-Appellees.

April 28, 2000, Filed

COUNSEL:
For STEVENS CREEK QUARRY, INCORPORATED, Plaintiff - Appellant: John M. Taylor, Esq., TAYLOR, HOOPER & WILEY, Sacramento, CA.

For SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER, CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN, Defendants - Appellees: Kathryn J. Zoglin, Esq., County Government Center, San Jose, CA.

For DIANNE MCKENNA, MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR., Defendants - Appellees: No Appearance.

JUDGES:
Before: SNEED, SCHROEDER, and TROTT, Circuit Judges.

OPINION:

MEMORANDUM[1]

Stevens Creek Quarry, Inc. ("Quarry") appeals the district court's order granting Santa Clara County Planning Commission et al.'s (collectively "County") motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The Quarry argues that, with regard to its claims that the County violated its procedural and substantive due process rights, the district court erred in concluding that the Quarry failed to state a claim upon which relief can be granted. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we AFFIRM.

A district court's order granting a motion to dismiss for failure to state a claim under Rule 12(b)(6) is reviewed de novo. Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998). For purposes of evaluating a motion to dismiss, we take as true all allegations of material fact stated in the complaint and construe them in the light most favorable to the nonmoving party. Warshaw v. Xoma Corp., 74 F.3d 955, 957 (9th Cir. 1996).

The Quarry's first argument is that the County violated its procedural due process rights by modifying the Quarry's use permit. To prevail on a 42 U.S.C. § 1983 claim based on a violation of procedural due process, a plaintiff must establish (1) a liberty or property interest protected by the constitution, (2) a deprivation of that interest by the government, and (3)

the lack of process. Portman v. County of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993). We assume that the Quarry had a protected property interest, see Lyng v. Payne, 476 U.S. 926, 942, 90 L. Ed. 2d 921, 106 S. Ct. 2333 (1986), and, therefore, the only question is whether the County provided the Quarry with sufficient process. In this case, the evidence shows that as early as September 1995, the Quarry had notice of the charges against it -- that it was violating the conditions of the use permit related to hours of operation, dust, noise, and lighting. In addition, the County continued the hearings five times, thereby giving the Quarry several opportunities to be heard. Accordingly, the Quarry received all the process that was due. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).

The Quarry also contends that the County violated "its substantive due process rights" when it modified the use permit. This claim is characterized by a charge of outrageous conduct that is akin to a takings claim. Here, the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible. Thus, even construing the allegations of the complaint in the light most favorable to the Quarry, the Quarry still fails to state a claim for a violation of substantive due process.

AFFIRMED.

Footnote

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

No. 96-20727

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

STEVENS CREEK QUARRY, INCORPORATED,
Plaintiff-Appellant,

v.

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,
Defendants-Appellees.

12/17/98 Dated

I. INTRODUCTION

This Section 1983 civil rights suit arises out of the Santa Clara County Planning Commission and the Board of Supervisors' decision to modify Plaintiff Stevens Creek Quarry, Inc.'s (hereinafter "the Quarry" or "Plaintiff") use permits. The Quarry alleges that the Santa Clara County Planning Commission and the Board of Supervisors, together with their respective members, violated the Quarry's rights to substantive and procedural clue process as guaranteed in the Fourteenth Amendment to the United States Constitution.

By order dated January 14, 1997, the Court granted Defendants' motion to dismiss with leave to amend. On

February 10, 1997, Plaintiff filed a Second Amended Complaint. On March 3, 1997, all Defendants moved to dismiss the Second Amended Complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P. The Court declined to rule on the motion and stayed the action pursuant to Railroad Comm'n of Texas y. Pullman Co., 312 U.S. 496, 61 *S.Ct.* 643, *85* L.Ed. 971 (1941).

During a case management conference conducted on November *5,* 1998, the parties expressed their desire to proceed with the case. Accordingly, the Court lifted the stay and set a hearing date for Defendants' motion to dismiss the Second Amended Complaint. The matter was heard on December 14, 1998. Based upon all pleadings filed to date, the Court GRANTS Defendants' motion to dismiss with prejudice.

II. BACKGROUND

The Quarry operates mining and equipment rental businesses on two adjacent parcels of property in Santa Clara County. One of the parcels, which the parties refer to as "Parcel A" was operating pursuant to a use permit first issued by the County of Santa Clara (hereinafter "the County") on September 20, 1950, and subsequently renewed, amended or both, on several occasions throughout 1984 to February 1995. There was no use permit issued for the second parcel, which the parties refer to as "Parcel B"

The Quarry alleges that on September 7, 1995, the Planning Commission scheduled a hearing regarding the reaffirmation, modification, or revocation of the Quarry's use permit without identifying any specific permit condition violations. The Quarry further alleges that between December 7, 1995 and June 6, 1996 it repeatedly requested, but was denied, adequate notice of any specific permit condition violations, On June 6, 1996, the Planning Commission

allegedly modified the Quarry's use permit in violation of the Quarry's constitutional rights.

The Quarry timely appealed the action of the Planning Commission to the Board asserting, among other things, that (I) the Commission had no authority to modify the use permit because it had not first identified a specific permit condition violation, and (2) the Commission failed to follow the appropriate procedures before deciding to modify the use permit. The Quarry also initiated the instant action in federal court on September 5, 1996.

On September 10, 1996, the board held a duly noticed public hearing and gave the Quarry an opportunity to be heard. The Quarry alleges that during the hearing, the Board failed to address, or even to discuss, whether the Planning Commission had failed to provide the Quarry due process. Instead, the Board allegedly improperly limited its focus to whether the Planning Commission's use permit modifications were satisfactory. Thus, the Quarry contends that the Board totally disregarded the true basis for the appeal, and thereby committed a separate due process violation. At the conclusion of the meeting, the Board voted unanimously to modify the Quarry's use permit conditions.

On December 17, 1996, the Board issued "findings" in support of its vote to modify the Quarry's use permit. The Quarry alleges that these findings fail to provide a legal basis for the Board's decision. The Quarry further alleges that the Board modified the use permit by adding "new and onerous conditions."

On March 14, 1997, the Quarry filed a writ and complaint in the Superior Court of Santa Clara County pursuant to California Code of Civil Procedure 1094.5, naming as defendants the Santa Clara County and the Board of Supervisors. The matter is still pending.

On February 10, 1997, the Quarry filed a Second Amended Complaint, which includes claims for denial of its substantive and procedural due process rights. The Quarry seeks consequential damages ranging from two million to twenty million dollars as well as punitive damages ranging from one million to twenty million dollars against each of the Defendants,

Defendants presently move to dismiss the Second Amended Complaint. First, Defendants assert that the appropriate vehicle for the Quarry's complaints is a petition for writ of mandate in state court. Second, Defendants assert that the Second Amended Complaint fails to state causes of action upon which relief may be based because it does not include sufficient allegations that plaintiff's procedural or substantive due process rights were violated. Defendants further assert that none of the acts described in the Second Amended Complaint rises to the level of a constitutional violation. Lastly, Defendants assert that the procedural due process claim must fail because the Quarry has not alleged that a protected property interest has been taken or that the procedural safeguards were inadequate.

III. STANDARDS

Pursuant to Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief can be granted. For purposes of evaluating a motion to dismiss, the complaint is construed in the light most favorable to plaintiff and its allegations are taken as true. Abramson v. Brownstein, 897 F.2d 389 (9th Cir. 1990). Dismissal can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri V. Pacifica Police Dept., 901 F'.2d 696, 699 (9th Cir. 1990); Robertson v. Dean Witter Reynolds. Inc., 749 F.2d 530, 533-534 (9th Cir. 1984).

As to those portions of a complaint which the district court finds do not state a claim for relief, leave to amend is ordinarily given freely. Fed.R.Civ.P. 15(a). A complaint or any claim in it should be dismissed without leave to amend only if "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment. Noll 809 F.2d 1446, 1448 (9th Cir 1987). However, leave to amend need not be given if the plaintiff has repeatedly failed to cure deficiencies by previous amendments or if further amendments arc likely to be futile. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

IV. DISCUSSION

To prevail on a Section 1983 claim, the Quarry must plead and ultimately prove that its alleged injuries amounted to a constitutional deprivation, and that the Defendants' actions caused the constitutional violation. Sec Halverson V. Skagit County, 42 F.3d 1257, 1260 (9th Cir. 1994).[2]

The Due Process Clause of the Fourteenth Amendment protects against deprivations "of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, see.1. To state a procedural due process claim, the Quarry must establish that it had a protected property interest, and if so, that it was denied this property right without the process which was due under the circumstances. Arroyo Vista Partners v. County of Santa Barbara, 732 F.Supp. 1046, 1053 (CD. Cal. 1990). "At the core of the due process clause is the right to notice and a hearing 'at a meaningful time and in a meaningful manner.'" Sinaloa Lake Owners Association v. City of Simi Valley, 882 P.2d 1398, 1405 (9th Cir. 1989).

A. The Quarry Fails to Allege Deprivation of Procedural Due Process

The Quarry alleges that Defendants violated its procedural due process rights when they "(1) failed to provide [the Quarry] with reasonable and meaningful notice regarding what use permit conditions it had allegedly violated; (2) conducted a hearing on September JO, 1996, characterized by bias and predetermined outcome; and (3) failed to provide a written set of findings which adequately described the legal basis for the action taken and the reasoning process employed." Second Amended Complaint, ¶49.[3]

The Quarry's allegation that Defendants failed to provide reasonable and meaningful notice of use permit violations is nothing more than a legal conclusion unsupported by a factual basis. As such, the Court need not accept it as true. See e.g. Papasan v. Allain, 478 U.S. 265, 286 (1986); see also. McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988). Moreover, the exhibits attached to the Quarry's original complaint demonstrate that the Quarry was given notice as early as September 1995 that the Commission was concerned with the Quarry's hours of operation and accompanying noise, dust, and bright lights. Complaint, Exs. 1-6. On December 13, 1995, the Planning Commission also notified the Quarry that "the legal

non-conforming use [for Parcel B] had substantially expanded beyond its historical scale and nature.

Furthermore, between January and June of 1996, the Quarry's counsel was corresponding regularly with the Planning Commission. By June of 1996, the Quarry's attorney was so familiar with the Commission's concerns that the parties attempted negotiating a resolution "to the issues stemming from the ongoing operations at the Stevens Creek Quarry," including truck speed, hours of operation, dust, noise, and lighting. Complaint, Ex. 6.

The Court also takes judicial notice of the various administrative records and reports submitted by Defendants. Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986). These documents establish that the Quarry was given fair notice of permit use violations and numerous opportunities to be heard. The Planning Commission held a series of public meetings regarding the Quarry on February 1, 1996, April 4, 1996, May 2, 1996, June 6, 1996. The Quarry was present and spoke at each of the meetings. Therefore, the Quarry's contention that it was not provided fair notice of potential use permit violations is unpersuasive.

The Quarry's allegation that Defendants conducted a hearing on September 10, 1996 "characterized by bias and predetermined outcome" is also deficient. "In attempting to make out a claim of unconstitutional bias, a plaintiff must "overcome a presumption of honesty and integrity' on the part of decision-makers." Stivers v. 71 F.3d 732, 741 (9th Cir. 1995). A plaintiff must show that "the adjudicator 'has prejudged, or reasonably appears to have prejudged, an issue." Id. In the present case, there are no facts alleged which would suggest that any of the Defendants prejudged the outcome of the hearing. Instead, the Quarry specifically alleges that one day before the hearing, Defendant Supervisor Diane McKenna released a memo indicating that the Board

was reviewing, de nova, the Planning Commission's recent modification to the Quarry's use permit. Thus, the allegations in the Second Amended Complaint belie the Quarry's argument.

The Quarry's third theory, that the Defendants failed to provide a written set of findings, is similarly without merit. The Board's Resolution, which is attached to the Second Amended Complaint, contains adequate findings. It explains the evidence upon which the Board's decision was based, the permit violations, and the Board's authority for modifying the permit.

In summary, even if the Court assumes that the allegations in the Second Amended Complaint are true, and construes them in a light most favorable to the Quarry the Court finds that Defendants' alleged conduct simply does not rise to the level of a procedural due process violation. Therefore, the Court dismisses the Quarry's procedural due process claim,

B. Substantive Due Process

The due process clause includes a substantive component "which guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate." Sinaloa Lake Owners Assn, v, City of Simi Valley, 882 R2d at 1407. The principle of substantive due process assures property owners of the right to be free from arbitrary or irrational actions, Arroyo Vista Partners v. County of Santa Barbara, 732 F.Supp. at 1053.

To establish a violation of substantive due process, a plaintiff must allege that the defendants' actions were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general

welfare." Sinaloa, 882 F.2d at 1407; see also Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1234 (9th Cir. 1994), cert. denied-- U.S. --, 115 S.Ct. 193, 130 L.Ed.2d *125* (1994). Thus, any government action which 'has no substantial relation to the public health, safety,morals, or general welfare' is arbitrary and unreasonable, and the converse is also true. Halverson v. Skagit Country, 42 F3d 1257, 1262 (9th Cir. 1995).

"The protection from governmental action provided by substantive due process has most often been reserved for the vindication of fundamental rights," such as marriage, family, procreation, and the right to bodily integrity. Halverson v. Skagit County, 42 F.3d *1257,* 1261 (9th Cir. 1994) (emphasis added), citing Aibright v, Oliver, --US. --, 114 S.Ct. 807, 812, 127 L.Ed.2d 114 (1994). The Supreme Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended." Collins v. City of Harker Heights. 503 U.S. 115,125, 112 S.Ct. 1061, 117 LEd2d 261 (1992). Accordingly, where a plaintiff relies on substantive due process to challenge governmental action that does not impinge on a fundamental right, federal courts "do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did." Halverson v. Skagit County, 42 F.3d at 1262, citing Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d *56,* (56 (9th Cir. 1994); also Kawaoka v. City of Arroya Grande, 17 F.3d 1227, 1234 (9th Cir.), cert. denied --U.S. --, 115 S.Ct. 193, 130 I. Ed.2d 125 (1994), The plaintiff must demonstrate the irrational *nature* of the defendants' actions by showing that they "could have had no legitimate reason" for their decisions. See Halverson v. Skagit County, 42 F.3d at 1262, citing Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1234 (9th Cir.), cert. denied *U.S.* --, *115* S.Ct. 193, 130 L.Ed.2d 125 (1994), If it is "at

least fairly debatable" that the decision is rationally related to a legitimate government interest, there can be no violation of substantive due process. Nelson v. City of Selma, 881 F.2d 836, 838 (9th Cir, 1989).

In the present case, the Quarry fails to allege conduct which rises to the level of a substantive due process violation. The Quarry alleges in only conclusory terms, without any factual support, that Defendants' actions were "arbitrary, irrational, and capricious in nature." Second Amended Complaint ¶48. Furthermore, the administrative reports and records demonstrate that Defendants were motivated by a legitimate concern for the public health and welfare. Specifically, the reports and records indicate that the Defendants were concerned with excessive truck traffic, excessive speed and failure to observe speed limit laws, spillage of quarry materials on public roads, excessive noise that violates the County Noise and Vibration ordinances, and expansion of quarrying activities beyond their historic scope and scale. The December 17, 1996 findings issued by the Board specifically address the public health and welfare concerns identified above. Finally, the permit use modifications ultimately imposed by Defendants also have a rational relationship to the public health and welfare concerns identified above. Therefore, the Court dismisses the Quarry's substantive due process claim.

C. Writ Of Mandate

On March 14, 1997, the Quarry filed a writ and complaint in the Superior Court of Santa Clara County pursuant to California Code of Civil Procedure § 1094.5, naming as defendants the Santa Clara County and the Board of Supervisors. The factual basis of the state court action is the same as the basis for this federal action. The writ includes a request or declaratory relief regarding the constitutionality of the local zoning regulations and a cause of action for

inverse condemnation. The matter is still pending.

The fact that there is a parallel state action pending also weighs in favor of dismissing the present federal action. A writ of mandate in state court is the preferred mechanism for resolving the parties' dispute, especially because the Quarry has not alleged any conduct by the Defendants which rises to the level of a constitutional violation. Sec Briggs v. City of Rolling Hills Estate, 40 Cal.App.4th 637, 47 Cal.Rptr.2d 29 (1995).

V. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss is GRANTED, I3ecause the Court finds that further amendments are likely to be futile, the dismissal is with prejudice.

DATED December 14, 1998

JAMES WARE
United States District Judge

This is to certify that copies of this order have been mailed to:

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[1]This disposition is not appropriate for publication and may not be cited.

[2] Section 1983 provides in relevant part:

> Every person who, under color of any Statute; ordinance, regulation custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

[3]For purposes of this motion, the Court assumes, without deciding, that the Quarry has a protected property interest.

No. 99-15066

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVENS CREEK QUARRY, INCORPORATED,
Plaintiff-Appellant,

v.

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,
Defendants-Appellees.

June 29, 2000, Filed

OPINION:

ORDER AMENDING MEMORANDUM DISPOSITION

The memorandum disposition filed April 28, 2000, is hereby amended as follows:

Delete the second sentence of the first full paragraph on page 3 that reads:

> "To establish a violation of substantive due process, a plaintiff must prove that the challenged government action either (1)

> violates a fundamental right and is not narrowly tailored to serve a compelling state interest, or (2) violates an ordinary, nonfundamental, liberty interest and does not rationally advance some legitimate governmental purpose. See *Reno v. Flores, 507 U.S. 292, 301-06 (1993).*"

Insert the following language in its place:

> "This claim is characterized by a charge of outrageous conduct that is akin to a takings claim."

With this amendment, the panel has voted to deny the petition for rehearing. Judges Schroeder and Trott have voted deny the petition for rehearing en banc, and Judge Sneed so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.